Supreme Court, U.S.
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No. 87-999

In The
Supreme Court of the United States
October Term, 1987

GORDON E. McQUILLEN,

Petitioner,

v.

WISCONSIN EDUCATION ASSOCIATION COUNCIL, DONALD E. KRAHN and MORRIS ANDREWS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The February 27, 1986 Findings of Fact, Conclusions of Law and Decision of the District Court appear in respondents' appendix at App. 3 through App. 15.

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STATEMENT OF THE CASE

The Petition as a whole, and in particular its Statement of the Case and Questions Presented, is incomplete, inaccurate and misleading in several important respects. We will supplement, correct and clarify as necessary.

Petitioner McQuillen worked as a law clerk at WEAC continuously since his first semester in law school in 1978. He graduated from law school in December, 1980 and was admitted to the Bar in January, 1981. He continued to work for WEAC under the title of Attorney-Clerk following his admission to the Bar and at all times material hereto. McQuillen challenges respondents' failure to hire him for the staff counsel position in the fall of 1982. Petitioner neglects to note that less than a year earlier, respondents also failed to hire him for an earlier staff counsel position, and instead hired a more qualified white male. When McQuillen approached Donald Krahn, WEAC's Director of Legal Services, to discuss the reasons why he was not chosen for the earlier staff position, Krahn advised McQuillen that his failure to secure any legal experience outside of WEAC was hurting him and that McQuillen should get outside legal experience. McQuillen did not do so.

The person ultimately hired for the staff counsel position now in dispute, Melissa Cherney, had been employed

as an attorney or law clerk at the National Labor Relations Board, the Wisconsin Employment Relations Commission, the Wisconsin Department of Justice and at a law firm which performed legal services for WEAC. She also graduated with honors from law school. Because respondent is a labor organization, such experience was particularly desirable. Throughout the trial, respondents contended that Cherney was hired because of her superior qualifications. At no point did respondents contend that she was hired pursuant to any written affirmative action plan.

Following a three day trial on the merits, the District Court issued its Findings of Fact, Conclusions of Law and Decision from the bench on February 27, 1986.[1] The District Court concluded that while the Executive Director Andrews may have had a predisposition to hire a qualified woman or minority if one was available, Cherney was obviously more qualified than the plaintiff and that although sex was a "factor" in the hiring decision, it was not "a determining factor".

Contrary to petitioner's statement, Krahn did not determine that the three finalists for the position were "equally qualified". In fact, Krahn simply did not rank the finalists. According to the Trial Court, Andrews "easily" determined that Cherney was the superior applicant. The Court stated:

> "Now, since Morris Andrews has easily rated Melissa Cherney superior to the plaintiff, and because this

[1] Petitioner failed to include the stenographic record of Judge Shabaz' Findings of Fact, Conclusions of Law and Decision in his Petition/Appendix. Respondents have included it in their Appendix, at App. 3.

> Court also finds that Ms. Cherney is better qualified than Mr. McQuillen, there is no factual support for the plaintiff to be appointed to the position despite a subjective in quotes (sic), "subjective" attitude found to be present in the selection by Mr. Andrews."

The Court also stated:

> "The Court has found and does conclude that Ms. Cherney was more qualified that Mr. McQuillen. The Court believes that the determination of Mr. Andrews on that score was correct even though there was that predisposition.
>
> For there to be any recovery the lost position must be traced to the defendant's discriminatory acts and not to a legitimate non-discriminatory decision to hire one better qualified for the position. And the Court finds that that legitimate articulation is not pretextual in nature."

At no point in its February 27, 1986 bench decision did the Court say that sex was a "motivating" factor. The Court stated that Andrews' interest in hiring a female was in the nature of a "predisposition".

The District Court noted that the petitioner's reliance on the recommendation of the other staff attorneys at WEAC was of little importance since they were personal friends and since most of them recommended McQuillen prior to interviewing any of the other finalists.

Subsequent to the bench decision and judgment, petitioner filed a Motion For New Trial and/or To Amend Judgment.[2] The new trial was sought to litigate the legality of WEAC's affirmative action plan. Petitioner asked the Court to amend its judgment in the following respects, *inter alia:*

[2] Respondents have included said Motion in their Appendix, at App. 16.

"3. That the Affirmative Action plan of WEAC (Exhibit 69) was a determining factor in causing the sex of the plaintiff to be a motivating factor in WEAC's decision to reject his application for employment in the fifth staff counsel petition and that plaintiff is entitled to reasonable attorneys' fees and costs with respect to this finding;

• • •

5. That the Court reconsider its finding of fact that the sex of plaintiff was not a determining factor in WEAC's decision to reject his application for the fifth staff counsel position;"

It was in response to this Motion that the District Court issued the Order dated May 2, 1986, included in petitioner's Appendix. The Court denied the Motion, finding no causal relationship between the affirmative action plan and respondents' employment decision. Despite petitioner's specific Motion for such a finding, the Court again refused to find that sex was either a "determining" factor or a "motivating" factor in the hiring decision. The Court did, however, in dicta, discuss the legality of WEAC's affirmative action plan. It concluded that the written plan itself, in conjunction with Krahn and Andrews' own confusion about what, if anything, the plan meant, was very confusing and deficient, but not illegal.[3]

The Court of Appeals concluded that there was no need to address the legality of the affirmative action plan because McQuillen failed to establish any causal connection between the plan and the hiring decision. The

[3] Contrary to petitioner's repeated statement that the Court found the plan deficient *inter alia* because it contained no time limitations, the Court made no such finding.

Court of Appeals concluded that, absent the causal connection, even a favorable conclusion of law on this issue would not entitle McQuillen to the attorney's fees he was seeking.

The Court of Appeals also concluded that the record "amply supported" the District Court's findings. Thus, the Court of Appeals upheld the District Court's conclusion that petitioner had failed to prove that his sex was a determining factor in his not being hired as staff counsel.

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REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED REGARDING THE ISSUE OF THE MT. HEALTHY CAUSATION STANDARD BECAUSE RESOLUTION OF THIS ISSUE WILL HAVE NO BEARING ON THE OUTCOME OF THIS CASE.

The petitioner seeks certiorari for the purpose of estabiishing the appropriate standard of causation for determining liability in a Title VII case. The discussion of the "but for" causation standard by the Court of Appeals is consistent with decisions dealing with that causation standard by all Circuit Courts that have addressed this issue, except the 8th Circuit. More importantly, the 7th Circuit's decision is consistent with statements made by the U. S. Supreme Court in prior decisions. See *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) and the Supreme Court's analysis in *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977). The Court very recently denied certiorari in at least one other mixed motive

case in which the lower Courts determined that the but for causation standard should be applied at the liability stage, rather than just the remedy stage. *Haskins v. Department of the Army*, 808 F.2d 1192 (6th Cir. 1987), petition for cert. denied, 56 U.S.L.W. 3242 (October 6, 1987).

The only case cited by the petitioner in support of his position is *Bibbs v. Block*. *Bibbs v. Block* is a recent decision by the 8th Circuit attempting to formulate a unique application of the but for standard of causation in mixed motive cases. The *Bibbs* case generated three different concurring opinions and a dissent joined by three judges, reflecting disagreement as to the reasoning applied. The defendants in *Bibbs*, the U. S. Department of Agriculture and its Secretary, did not file a petition for certiorari. While the 8th Circuit's preliminary analysis appears to differ from that of other Circuits, it would be premature to evaluate what if any impact such an analysis will have. This situation hardly constitutes a conflict sufficiently developed or significant to be worthy of review at this time.

Moreover, resolution of the theoretical issue of whether the but for causation standard should be applied at the liability stage or the remedy stage will have no impact on the results of this case. Even the proponents of the *Bibbs* theory acknowledge that the existence of discriminatory conduct must be proven by the plaintiff under the *McDonnell-Douglas* test before the dual motive analysis is warranted. Under the *Bibbs* theory, there is no reason to engage in the but for examination unless and until plaintiff proves that discriminatory conduct occurred. In this case, plaintiff failed to sustain the burden of showing

that sex was a motivating or a determining factor in respondents' conduct.

The District Court ruled very emphatically that Melissa Cherney was easily rated as better qualified than petitioner and that her superior qualifications were the basis for her being hired for the position. The Court did find that sex was a "factor" in the decision not to hire the plaintiff; however, it was not "a determining factor". The Court then clarified that the factor it was referring to was manifested by the subjective attitude of Morris Andrews. The Court, however, found Mr. Andrews' conduct in hiring Ms. Cherney to be correct "even though there was that predisposition". Finally, the Court stated that for there to be any recovery "the lost position must be traced to the defendant's *discriminatory acts* and not to a legitimate non-discriminatory decision. . . ." (Emphasis added)

The point is that even under *Bibbs*, a defendant is not found liable under Title VII merely on the basis of his opinions or predispositions. He can only be found liable on the basis of *conduct*, i.e. *acting* on the basis of impermissible bias. Inviting the Court to impose liability on the basis of a determination that an employer harbors discriminatory attitudes or thoughts without requiring a showing that such thoughts or attitudes were operative or that they motivated conduct is to invite the Court onto a slippery slope that would send the First Amendment and Title VII on a collision course.

In this case, the District Court did not find sex to be a "motivating" factor as asserted by petitioner. Indeed, the Court found that sex was not even "*a* determining factor" in the decision. The but for test would require

sex to be *the* factor that triggers the complained of conduct. The Court's finding of fact that sex was not "*a* determining factor" shows that it was not operative in triggering conduct. This, coupled with the Court's articulated distinction between "discriminatory acts" and "predispositions" demonstrates that the record herein does not support classifying this case as a "mixed motive" case giving rise to the cause issue dealt with in the *Bibbs* and *Mt. Healthy* analyses.

The fact that the District Court explicitly denied the post trial motions brought by petitioner to modify the Court's judgment, especially with respect to sex not being *a* determining factor in WEAC's decision, demonstrates that the Court did not choose its words inadvertently in this regard. The Court was looking for discriminatory *conduct* rather than thoughts or predispositions. It found no such *conduct*. The Court of Appeals concluded that the record "amply supports" the District Court's determination.

The District Court found that Cherney was hired because she was more qualified than the plaintiff. The Court of Appeals, after a thorough review of the record, concluded that the record "amply supports" the District Court's determination. Thus, even if the 7th Circuit had been willing to apply the 8th Circuit's approach in *Bibbs*, the Court would never have reached the issue of remedy because petitioner failed to prove liability by failing to prove that respondents' contention that Cherney was more qualified was pretext or that discrimination occurred. Petitioner is now attempting to pick and choose from different legal paradigms so as to prevail on some legal issue in order to recover attorneys fees.

II. REVIEW OF PETITIONER'S SECOND QUESTION CONCERNING BURDEN OF PERSUASION SHOULD BE DENIED BECAUSE REGARDLESS OF THE LAW ON BURDEN OF PERSUASION, RESPONDENTS IN FACT ASSUMED AND MET THE BURDEN AT TRIAL AND PROVED THAT DISCRIMINATION WAS NOT A MOTIVATING FACTOR.

The burden of proof allocation is a function of the Trial Court subject to appellate review. In this case, the District Court made no comment about burden of proof, and burden of proof was not at issue during the trial. Indeed, the petitioner did not address any burden of proof concerns in his post trial motions and he did not cite any burden of proof issue as his basis for appeal to the Court of Appeals.

The Court of Appeals did discuss the "burden of persuasion" in a footnote. Petitioner now seeks Supreme Court review of an issue which was not in dispute in the lower Courts by focusing upon the footnote and misstating the legal issue.

Petitioner asks the Court to decide "whether the plaintiff or the defendant has the burden of persuasion on the 'but for' issue *once the plaintiff proves that discrimination was a motivating factor in the employment decision*" (emphasis added). Petitioner's statement of this question presumes a condition which does not exist because it was not established at trial. Thus, petitioner asks the Court to resolve an academic issue with no bearing on this case.

At trial petitioner did not prove that "discrimination was a motivating factor in the employment decision". As discussed above, despite petitioner's specific request to

do so, the District Court refused to find that discrimination was either a "motivating" or "determining" factor in the hiring decision.

Petitioner, by inserting the word "motivating" into its Statement Of The Question, its Statement Of The Case and its Argument, has significantly mischaracterized the factual and legal issues involved. Both the District Court and the Court of Appeals determined that the "determinative", i.e. motivating, factor for respondents' hiring of Melissa Cherney was her superior qualifications.

Even if the Court were to choose to consider this abstract issue and were to conclude that the Court of Appeals erred in stating the burden of proof, such error would be harmless. As the Court of Appeals' careful review and description of the record demonstrates, respondents did *in fact* assume the burden of proving Cherney's superior qualifications. As the Court of Appeals summarized, respondents proved that:

> Cherney had excellent academic credentials, graduating with honors from the University of Wisconsin Law School. Her professional experience was diverse and well suited to WEAC's needs. Prior to applying for the position, Cherney had worked as a lawyer for three years with the National Labor Relations Board. She had also had clinical and clerkship experience with the Wisconsin Employment Relations Commission, the Wisconsin Department of Justice, and a law firm utilized by WEAC.

It was also proven that McQuillen had no outside legal experience since he had clerked continuously at WEAC since his first semester of law school and that he had a mediocre law school record. Respondents proved that

Krahn, head of WEAC's legal department, advised McQuillen, after WEAC failed to hire McQuillen for a staff position in 1981 (for which a better qualified white male was hired), that he should get outside legal experience if he wanted to establish his qualifications for a future staff counsel position.

The issue of who had the burden of persuasion was not an issue before the Trial Court nor before the Court of Appeals. Now petitioner seeks Supreme Court review because of a comment made by the Court of Appeals in a footnote. At trial, petitioner offered no evidence to rebut the fact of Cherney's superior academic and professional experience qualifications. Petitioner offered no evidence to rebut the fact of his own lesser academic and professional experience qualifications. Whatever comment was made by the Court of Appeals in a footnote, at trial the respondents more than carried the burden of proof in showing that their reason for hiring Cherney was her superior qualifications.

III. CERTIORARI SHOULD BE DENIED REGARDING THE AFFIRMATIVE ACTION PLAN BECAUSE THE RULINGS OF THE LOWER COURTS WITH RESPECT TO THIS ISSUE WERE NOT CLEARLY ERRONEOUS.

Petitioner asks the Court to review the legality of an affirmative action plan and find it illegal as a matter of law. The Court should deny this request. The District Court found, and the Court of Appeals affirmed, that the affirmative action plan was not causally related to the employment decision taken. Hence, there is no reason to review the plan because it is immaterial to the outcome of the case. The District Court evaluated the actions, state-

ments and possible motives of Donald Krahn and Executive Director Morris Andrews with regard to the affirmative action plan. The District Court expressly found that Cherney was hired because of her superior qualifications and not pursuant to the affirmative action plan.

In denying petitioner's motion for a new trial concerning the legality of the affirmative action plan, the Court summarily rejected petitioner's apparent belief that a mere finding that the plan was illegal would establish the causal link necessary to petitioner's success. The Court did, however, go on in what is essentially dicta to evaluate the plan.

While the District Court found WEAC's affirmative action plan to be inartfully drawn and confusing, it found that said plan related to the "searching" or recruitment of a broad spectrum of candidates and did not mandate *hiring* any particular candidate on a preferential basis. Indeed the affirmative action plan also contains the following statement:

> "WEAC managers shall:
>
> * * *
>
> B. recruit, hire and promote in all position classifications without regard to . . . sex."

Since the affirmative action plan did not mandate or require that preference be given with respect to hiring or promotions or other terms of employment on the basis of sex or any other impermissible basis and since WEAC never claimed that said plan was the basis for Cherney being hired, the plan had no determinative relevance in this case. Furthermore, the Court concluded that Krahn's recommendation letter was not a reference to a plan mandating the hiring of a female, but rather a statement indicating that the increased competition generated by a search for minority candidates would sharply reduce McQuillen's chances of hire, just as it had done when the former vacancy was filled.

The determination of what role, if any, an affirmative action plan played in an employment decision is a matter of fact. Both Krahn and Andrews testified about their reasons for hiring Cherney and declining to hire McQuillen. They also testified about their understanding of the plan, and the role it did or did not play in their employment decisions. Despite petitioner's specific request in his motion for a new trial that the Court find the affirmative action plan to be a determining factor in the hiring decision, the District Court concluded that the affirmative action plan was not causally related to the hiring decision.

Such a finding is a finding of fact under Fed. R. Civ. P. 51(a) and cannot be overturned unless clearly erroneous. *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 573 (1985). A Trial Court's finding of discriminatory intent, or lack thereof, can only be overturned if clearly erroneous. *Batson v. Kentucky*, 476 U.S. — [106 S. Ct. 1712, 1742, N. 21 (1986).]

The Court of Appeals correctly declined McQuillen's request to review the legality of the affirmative action plan. The Court characterized that request as a mere hope that McQuillen would be awarded attorney's fees if he could prevail on some legal issue.

To the extent that petitioner alleges that the burden and allocation of proof issues relate to the issue of the

affirmative action plan, he is in error. As the Court of Appeals correctly reasoned, if an employer asserts that a hiring decision was made pursuant to an affirmative action plan, then the plaintiff has the burden of proving the illegality of the plan. *Johnson v. Transportation Agency, Santa Clara County*, — U.S. —, 107 S. Ct. 1442, 1449 (1987). If the employer asserts that its hiring decision was based on some other factor, e.g. superior qualifications, then a plaintiff who wants to challenge the legality of an affirmative action plan must first establish that the employer was actually acting pursuant to the plan. Under either scenario, the plaintiff has the burden of proof. Here, the petitioner failed to establish the causal link at trial, then failed on a post judgment motion to convince the Court the plan was either a motivating or determinating factor in the hiring decision, and then failed to convince the 7th Circuit to reverse on this issue.

—o—

CONCLUSION

The District Court evaluated both the actions and motives of respondents in hiring Melissa Cherney rather than the petitioner. After evaluating the testimony, including the intent and credibility of Donald Krahn and Morris Andrews, the District Court concluded that respondents hired Cherney because she was more qualified. In response to petitioner's post-judgment motion to find either sex or the affirmative action plan a "determining" or "motivating" factor in the hiring decision, the District Court declined to do so.

The 7th Circuit held that the District Court's findings were amply supported by the record. Petitioner has failed to show that any of the District Court's material findings of fact are clearly erroneous. Instead he seeks review for the purpose of deciding legal issues with no bearing on this case. Therefore, the Court should deny the writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted this 13th day of January, 1988.

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No. 87-999

In The

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GORDON E. McQUILLEN,

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v.

WISCONSIN EDUCATION ASSOCIATION COUNCIL, DONALD E. KRAHN and MORRIS ANDREWS,

Respondents.

APPENDIX OF THE RESPONDENTS, WISCONSIN EDUCATION ASSOCIATION COUNCIL, DONALD E. KRAHN AND MORRIS ANDREWS

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PETITIONER'S POST TRIAL MOTION ..... App. 16 - App. 18

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GORDON E. McQUILLEN,

Plaintiff,

vs.

Case No. 85C648S

WISCONSIN EDUCATION ASSOCIATION COUNCIL, DONALD E. KRAHN, Director of Legal Services Division of WEAC, and MORRIS ANDREWS, Executive Director of WEAC,

Defendants.

(Filed April 23, 1986)

STENOGRAPHIC TRANSCRIPT of the Court's Findings of Fact, Conclusions of Law and Decision, in the above-entitled matter, held before the Honorable JOHN C. SHABAZ, on the 27th day of February, 1986, at Madison, Wisconsin.

APPEARANCES

Fox, Fox, Schaefer & Gingras, S.C., 44 East Mifflin Street, Madison, Wisconsin, by A. STEVEN PORTER and ROBERT J. GINGRAS, appeared on behalf of the Plaintiff.

Kelly, Haus & Katz, 121 East Wilson Street, Madison, Wisconsin, by STEPHEN G. KATZ and WILLIAM HAUS, appeared on behalf of the Defendants.

BARBARA L. LAZARIS, Official Court Reporter
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Court's Findings, Conclusions and Decision—page 3

(p. 3) (5:23 P.M.)

THE COURT: The Court at this time will issue its Findings of Fact and Conclusions of Law with the understanding that it reserves the opportunity to supplement its remarks, if indeed it considers that to be appropriate.

As to the Findings of Fact, the plaintiff, Gordon E. McQuillen resides at 950 South Midvale Boulevard, Madison, and Dane County, Wisconsin; and has been employed by the defendant, WEAC, since November 2 of 1978, and is presently working part-time as a Uniserv director.

The defendant, Wisconsin Education Association Council WEAC, is a labor organization representing more than 42,000 teachers and other school employees in Wisconsin, with a staff of 64 employees with offices in the principal place of business located at 101 West Beltline Highway, Madison, Dane County, Wisconsin; and is engaged in an industry affecting commerce. Membership of the organization, WEAC, is between 58 to 62 percent female and minority members. The WEAC staff is 42.5 percent female. The defendant's legal department employs professional staff counsel of six: Four male and two female attorneys who represent WEAC local affiliates and individual members. The legal department also em-

ploys law clerks who are either law students or recent law school graduates licensed to practice law.

The defendant Morris Andrews resides at 4200 Karmichael (p. 4) Court, Madison, Dane County, Wisconsin, and is executive director of WEAC.

The defendant Donald Krahn resides at 431 East Milwaukee Avenue, Ft. Atkinson, Jefferson County, Wisconsin; and is the director of the Legal Services Division of WEAC.

On January 23, 1984, plaintiff filed a charge of employment discrimination with the Equal Employment Opportunity Commission, and on April 17, 1985, received a notification of his right to sue, commencing this action on July 17, 1985.

The plaintiff graduated from law school, December of 1980, and was admitted to the practice of law in Wisconsin in January of 1981, after which he continued to work under the title of attorney-clerk, which position, which is not included in a collective bargaining unit. During his WEAC employment, Mr. McQuillen performed competently and his legal skills were viewed with high regard by his co-workers, supervisors and Mr. Krahn who recommended his employment with the Southwest Teachers United on June 30, 1982, as follows: "Gordon would very much like to be a WEAC staff counsel. Our Affirmative Action Program would require us to search for a qualified woman, if we are to create a fifth attorney position. Thus his chances for employment here are very limited. It would be a genuine loss for all of us if he had to leave Wisconsin in order to find a permanent position

in teacher-labor relations. He will make a very good employee."

(p. 5) On or about October 19, 1982, WEAC posted for a new staff counsel position. That would be the fifth position. That posting was until March 1 of 1983. Ms. Rubin, a candidate for this position, left the employ of WEAC during this period. The plaintiff applied for this position on November 3 of 1982 and his application was not acknowledged.

On March 1 of 1983 WEAC posted and advertised for applicants for an Attorney 1 position. This is an entry level position. This was an external posting, an open posting. The Court is of the opinion and finds that 66 applicanfs expressed interest, of which 12 were selected for further consideration, to include the plaintiff. And, this was the same position for which posting was previously internally made. Interviews were conducted of those finalists who remained. Three—plaintiff, and two females, Melissa Cherney and Jackie Kineman, were recommended by Mr. Krahn as the finalists for this position, to Mr. Andrews who selected Ms. Melissa Cherney, a female, who accepted the offer on June 22 of 1983 and now fills this position.

All four staff counsel, Priscilla MacDougall, Steven Pieroni, Michael Stoll and Bruce Meredith recommended to Mr. Krahn that the plaintiff be hired. MacDougall, Pieroni and Stoll made this recommendation initially as soon as the position was made available and before all of the applications and the candidates' interviews were taken. Meredith (p. 6) made this recommendation of the plaintiff after the candidates' interviews.

The plaintiff was interviewed for the position during the week of May 23, 1983, by Messrs. Krahn, MacDougall, Pieroni and Stoll.

The successful candidate, Melissa Cherney, was also interviewed. She had some difficulty with the interview. Plaintiff did better. Ms. Cherney had a better academic record than plaintiff, having graduated with Distinction. She had better recommendations or references, those being from Cheryl Weston of the law offices of Cullen & Weston, June Miller-Weisberger, who is a professor at the University of Wisconsin and who had Ms. Cherney in her class, and a member of the National Labor Relations Board who supervised the employment of Ms. Cherney during a period of approximately two years. She also received satisfactory ratings from the NLRB, which were included in her application and resume.

The Court further finds that the successful applicant, Melissa Cherney, had a wider variety of employment, a more diverse employment, although a perhaps positions of limited responsibilities, no less limited than perhaps did the plaintiff. Those work experiences being at the National Labor Relations Board, the Wisconsin Employment Relations Commission, the Department of Justice, and the private law firm of Cullen & Weston.

(p. 7) The plaintiff had more experience with WEAC and did better than did candidate Cherney on the interview.

The Court will also indicate that the plaintiff had the recommendations of staff of all four staff counsel.

The next finding relates to this Court's determination that Mr. Krahn advised Mr. McQuillen in June of 1983

that he was under a great deal of pressure to hire a female for the position. He further advised Stoll, Pieroni and Meredith that he preferred to fill the position with a female.

The selection procedure and the appointment of attorney position that we are presently discussing—which the Court calls Position V—differed from past practices in that Mr. Andrews was not only responsible for the final decision but indeed made the final decision with recommendations made to him only by Mr. Krahn. Mr. Krahn provided Mr. Andrews a brief memorandum concerning the three finalists. The memorandum referred to Melissa Cherney, Jackie Kineman, and the plaintiff, Gordon McQuillen. Although Mr. Andrews did not examine the individual files of the three finalists, nor did he interview them, he did make two reference calls: One to a Mr. DeMars on behalf of Ms. Kineman, and one to an NLRB officer on behalf of Ms. Cherney. He further discussed the qualifications with Mr. Krahn on a limited basis and the Court finds he did examine the vita for each of the candidates together with the contents of the memo. He also considered (p. 8) his own knowledge of the plaintiff's work experience.

The memo specifically advised that all of the candidates are well qualified and the choice is difficult. Any reservations that Mr. Krahn may have had concerning the plaintiff were not communicated to Mr. Andrews. The memorandum has been received into evidence and does indeed recite the principal qualifications of the three finalists.

Some time between June 10, 1983 and June 23, 1983, Mr. Andrews advised Mr. Krahn to hire the woman from Milwaukee. Ms. Cherney was appointed on June 22nd of 1983. Several days prior to that on June 17th and 18th, the WEAC board of directors amended its Affirmative Action Plan to include the paragraph 9(b) as follows—*b* had previously been included in the original plan, but they amended 9(b) as follows: A serious systematic search shall be made for minority person to fill WEAC staff vacancies until such time as the ratio of minority persons on the staff reflects the proportion of minority personnel governed by WEAC. This provision is further defined to include females. The definition of "minorities" does include "females." The amendment was drafted and prepared by Mr. Andrews and was adopted by the board at its June 17, 1983 directors' meeting.

Some time in 1983 Mr. Andrews advised Charles Garnier, a WEAC employee who he directly supervised, that two Uniserv units should hire a woman director or a serious chance existed (p. 9) further funding would not be received. Andrews was urged and advised by the National Education Association, NEA, the national organization for WEAC, to adopt practices regarding the hiring and promotion of minority and female applicants, which Mr. Andrews believed to be a request for an illegal quota system which he determined would not be followed.

The Affirmative Action Plan, however, to which this Court has referred as being amended by June 17th and 18th of 1983, was an amendment which was created and adopted by WEAC because of encouragement from NEA. It did not, does not appear to be related to any appropriate

labor market, nor does it appear to be based either on the need to remedy past discrimination or because of any statistical disparity. It appears to be based on the desire to increase the number of females and minorities on the WEAC staff from the current 42.5 percent to something between 58 and 62 percent.

The Court is as confounded with the memorandum of September 2, 1982, prepared by Mr. Andrews as is Mr. Krahn. The Court has read that paragraph on page 2, from the first time it was brought out of the pocket of Mr. Garnier, when he testified on the witness stand, about one week ago. And Mr. Krahn was asked what does it mean. And he said he didn't know. And the Court would indicate it doesn't know either. The Court would expect something better from an educational association such as this. It reads as follows: "It is my (p. 10) understanding of our policy that we will hire qualified minority and women until we have proportionally at least the number of staff that we have members. I do not mean reverse quota system. However, I believe that at a minimum it can be said that the Uniserv hiring standard is only to employ women and/or minorities if they are judged by the local hiring committee to be the most qualified job applicant. I do not believe this is the policy or its intention." Do you, as the board of directors, believe that this is the policy or its intention? The Court would be interested to learn the response.

But, in any event, that did appear to be ambiguous policy which was followed by the WEA on September 2 of 1982, and it was further amended on June 17 of 1983, as the Court has previously referred to those minutes which adopted this subsequent policy by the board of directors.

The Court must find at this point that sex was a factor in the decision of the defendants not to hire the plaintiff. It was not, however, a determining factor because the successful candidate, Melissa Cherney, was more qualified than the plaintiff.

As it relates to the claim for retaliation, WEAC law clerks were not eligible for, nor did they receive, group health insurance coverage before June 10, 1983. Plaintiff waived his right to any such coverage on June 23, 1983, (p. 11) refusing the plan which was offered. The law clerk, Shaune Curry, on December 6, 1984, and William Sample (ph), February 28, 1985, individually negotiated with Mr. Krahn for health and dental insurance benefits at the expense of WEAC. Because Mr. McQuillen did not require or need those benefits he then attempted without success to do his own negotiations. He wished to negotiate a wage increase by an amount equivalent to the cost of insurance coverage. This was rejected. The Court believes that this was an attempt at individual collective bargaining, individual negotiation which failed.

The Court would make the following conclusions of law: Prima facie case of sex discrimination under Title VII has been made. Mr. McQuillen is a member of a protected class under Title VII. He is a male. He applied for employment for which he was qualified, the position of staff attorney with WEAC, for which he had the necessary qualifications. He was not hired and Melissa Cherney, a person of the opposite sex, was hired. The Court concludes that from the very beginning a struggle began. Fellow staff members rallied around Mr. McQuillen. They wanted the plaintiff to obtain that position. Three of the

existing counsel cared not about who else may be applied or what qualifications those folks may have had. Mr. Meredith, at least before he rallied around the flag, made the determination that he would examine the qualifications of the other applicants and did (p. 12) attempt to make some even-handed determination as to who he believed to be the most qualified. The Court, however, finds this to be regardless of the well-intentioned motives, a ridiculous hiring procedure in which the employees themselves select their fellow employees, an abdication of management's responsibility. And, that, coupled with the ambiguous policy perceived by WEAC to hire minorities and women, created a disaster that—well, again it seems to be the personal determinations of those folks who are involved in the process, and I suppose they should be saddled with either benefits and detriments of the particular programs and procedures which they wish to follow.

Mr. Stoll was clearly just didn't want to reject a friend again. He had difficulty enough when the rejection was made from the hiring of Mr. Pieroni and he sure didn't want that to happen again. I believe the staff employees failed to have the objectively necessary to determine the qualification of those folks who applied, particularly as a result of their close relationship with Mr. McQuillen. That, of course, doesn't excuse the conduct of Mr. Krahn and Mr. Andrews. There is no question they had that predisposition as well. They were going to attempt to find a female employee to obtain this job or a minority, perhaps even regardless of those qualifications which the applicants may have had.

(p. 13) Mr. Krahn was under a great deal of pressure and he decided he would take care of the hot potato by

making three recommendations to Mr. Andrews, indicating that the counsel, the staff counselors thought Mr. McQuillen was indeed qualified, and he will let that decision be made by Mr. Andrews.

Now, since Morris Andrews has easily rated Melissa Cherney superior to the plaintiff, and because this Court also finds that Ms. Cherney is better qualified than Mr. McQuillen, there is no factual support for the plaintiff to be appointed to the position despite a subjective in quotes, "subjective" attitude found to be present in the selection by Mr. Andrews.

The Court will refer you to *Rogers v. Equal Opportunity Commission* in which the court has extracted some of the language from that case because indeed it seems to be right on as it concerns this one. Mr. Rogers received a less than favorable job position as an EEOC director. And the court in that instance found, as the Court must here as well, that the selection perhaps was not completely neutral. However, the court concludes, as this Court has concluded, that monetary relief should be denied a Title VII plaintiff if his qualifications were such that he would not, even absent discrimination, have been selected for the position in question. Congress did not intend to make employers liable for failure- (p. 14) to-hire decisions that are only partially based on discriminatory considerations, and the citation of that case is 551 F. 2d 456. It is a United States Court of Appeals from the District of Columbia. The language is specifically at page 457. Shepardizing this this afternoon, the Court stumbled on one of the cases in which it didn't do so well at the Seventh Circuit, but the Seventh Circuit at least accepted the Court's

reasoning to some extent in *Cavialli v. State of Wisconsin,* 744 F. 2d 1289, Seventh Circuit, 1984 in which the Seventh Circuit agreed with this Court when it enunciated that Title VII was not intended to guarantee a job to evrey person regardless of qualifications.

The Court has found and does conclude that Ms. Cherney was more qualified than Mr. McQuillen. The Court believes that the determination of Mr. Andrews on that score was correct even though there was that predisposition.

For there to be any recovery the lost position must be traced to the defendant's discriminatory acts and not to a legitimate non-discriminatory decision to hire one better qualified for the position. And the Court finds that that legitimate articulation is not pretextual in nature.

Accordingly, the Court will dismiss the complaint of the defendant against the plaintiff, with prejudice and costs.

(p. 15) And, the Court was so interested in being verbose—I quess Mr. Katz, it is catching. This one-and-a-half-day trial has extended beyond the bounds which the Court believes to be appropriate parameters, by the wealth of inappropriate testimony brought to the Court's attention and which it has not considered.

The issue was indeed clear. Indeed it was so clear that the Court had little difficulty in enunciating its findings that it has from the bench, with the understanding that it may very well review those and make a treatise out of them if it finds it wants to become a law clerk again.

The fact is that the case is dismissed as indicated. If I haven't already stated as the conclusion of law I will so state that the Court determines that there was not retaliatory action as it concerns the count of the health insurance.

This then concludes the matter for the time-being anyway. And this Court is adjourned for the day.

Thank you.

(Which concluded the Court's statements at 5:50 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GORDON MCQUILLEN,

plaintiff,

-vs-

WISCONSIN EDUCATION
DONALD E. KRAHN, and
ASSOCIATION COUNCIL,
MORRIS ANDREWS,

Defendants.

MOTION FOR
NEW TRIAL
AND/OR TO
AMEND JUDGMENT

Case No. 85-C-648-S

The plaintiff, Gordon E. McQuillen, by his attorneys, Fox, Fox, Schaefer & Gingras, S.C., by Robert J. Gingras, and A. Steven Porter, hereby moves the Court pursuant to Rule 59(a) and (e) of the Federal Rules of Civil Procedure for a new trial and/or to amend the judgment entered in the above-entitled action.

Specifically, plaintiff moves the Court to amend its findings of fact and conclusions of law and judgment in this matter so as to grant the plaintiff the following relief:

1. That the Affirmative Action plan of the defendant WEAC (Exhibit 69) be declared illegal and that it be abolished;

2. That the plaintiff be awarded reasonable attorneys' fees and costs as it relates to the Court's finding that the Affirmative Action plan of WEAC (Exhibit 69) is illegal and its conclusion and judgment that said plan be abolished;

3. That the Affirmative Action plan of WEAC (Exhibit 69) was a determining factor in causing the

sex of the plaintiff to be a motivating factor in WEAC's decision to reject his application for employment in the fifth staff counsel position and that plaintiff is entitled to reasonable attorneys' fees and costs with respect to this finding;

4. That the plaintiff is entitled to attorneys' fees and costs with respect to the Court's finding that the sex of the plaintiff was a motivating factor in the defendant's decision to reject plaintiff for the fifth staff counsel position.

5. That the Court reconsider its finding of fact that the sex of plaintiff was not a determining factor in WEAC's decision to reject his application for the fifth staff counsel position; and

6. Injunctive relief against future and continued discrimination.

This motion is based upon the pleadings and record herein as well as plaintiff's proposed findings of fact and conclusions of law, plaintiff's trial brief, the record at trial, the Court's findings of fact and conclusions of law, and plaintiff's memorandum in support of plaintiff's motion for a new trial and/or to amend judgment.

Dated this 10th day of March, 1986.

Respectfully submitted,

By

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